

FEDERAL MARITIME COMMISSION

DOCKET NO. 14-06

**SANTA FE DISCOUNT CRUISE PARKING, INC. d/b/a EZ
CRUISE PARKING; LIGHTHOUSE PARKING, INC.; and
SYLVIA ROBLEDO d/b/a 81ST DOLPHIN PARKING**

v.

**THE BOARD OF TRUSTEES OF THE GALVESTON
WHARVES and THE GALVESTON PORT FACILITIES
CORPORATION**

**ANSWER OF RESPONDENTS THE BOARD OF TRUSTEES OF THE GALVESTON
WHARVES AND THE GALVESTON PORT FACILITIES CORPORATION**

COME NOW The Board of Trustees of the Galveston Wharves (“Wharves”) and the Galveston Port Facilities Corporation (“GPFC”), respondents in the above entitled and numbered cause, by and through their attorneys, Anthony P. Brown and Wm. Hulse Wagner, as and for their answer to Complainants’ complaint herein respectfully allege and state as follows:

I. ADMISSIONS & DENIALS

1. Answering Paragraph I.A. of Complainants’ Complaint, Respondents lack sufficient knowledge or information to form a belief about the truth of the paragraph.

2. Answering Paragraph I.B. of Complainants' Complaint, Respondents lack sufficient knowledge or information to form a belief about the truth of the paragraph.
3. Answering Paragraph I.C. of Complainants' Complaint, Respondents lack sufficient knowledge or information to form a belief about the truth of the paragraph.
4. Respondent Wharves admits that it publishes rules, regulations and tariffs for the Port of Galveston. Respondents denies the remaining allegations in Paragraph II.A. of Complainants' Complaint.
5. Respondent GPFC admits that is a nonprofit corporation organized and existing under the laws of the State of Texas and was incorporated on June 17, 2002. Respondents deny the remaining allegations in Paragraph II.B. of Complainants' Complaint.
6. Respondents deny the allegations in Paragraph II.C. of Complainants' Complaint.
7. Respondents deny the allegations in Paragraph III.A. of Complainants' Complaint.
8. Respondents deny the allegations in Paragraph III.B. of Complainants' Complaint.
9. Respondents admit the allegations in Paragraph IV.A. of Complainants' Complaint.
10. Respondents lack sufficient knowledge or information to form a belief about the truth of the allegations regarding Complainants' creation and business dealings. Respondents deny Complainants are a more economic and convenient alternative to parking within the Port of Galveston facility in Paragraph IV.B. of Complainants' Complaint.
11. Respondents admit the allegations in Paragraph IV.C. pertaining to the number of covered parking spaces offered on a first come first served basis but deny the remaining allegations within said paragraph.
12. Respondents admit the allegations in Paragraph IV.D. of Complainants' Complaint.

13. Respondents admit that the Wharves promulgated the Tariff and the Access Fees included therein. Respondents deny the remaining allegations within Paragraph IV.E. of Complainants' Complaint.
14. Respondents admit the allegations in Paragraph IV.F. of Complainants' Complaint.
15. Respondents admit the allegations in Paragraph IV.G. of Complainants' Complaint.
16. Respondents admit the allegations in Paragraph IV.H. that the Tariff provided a methodology for determining annual increases to monthly Access Fees charged to Off-Port Parking Users based on consumer price index growth but deny the implication that the Board's election not to increase the monthly Access Fee in 2011, 2012, and 2013 constituted a failure of implementation.
17. Respondents admit the allegations in Paragraph IV.I. of Complainants' Complaint.
18. Respondents admit the allegations in Paragraph IV.J. of Complainants' Complaint.
19. Respondents deny the allegations in Paragraph IV.K. of Complainants' Complaint.
20. Respondents deny the allegations in Paragraph IV.L. of Complainants' Complaint.
21. Respondents deny the allegations in Paragraph IV.M. of Complainants' Complaint.
22. Respondents admit the allegations in Paragraph IV.N. of Complainants' Complaint.
23. Respondents deny the allegations in Paragraph IV.O. of Complainants' Complaint.
24. Respondents deny the allegations in Paragraph IV.P. of Complainants' Complaint.
25. Respondents admit the allegations regarding the amounts charged to "Airport Shuttles" and for "Per Trip Access Fees" set out in Paragraph IV.Q. of Complainants' Complaint. Respondents deny the remaining the allegations in Paragraph IV.Q. of Complainants' Complaint.

26. Respondents lack sufficient knowledge or information to form a belief about the truth of the statements regarding actual occupancy of Complainants' lots in Paragraph IV.R. of Complainants' Complaint. Respondents deny the remaining allegations set out in Paragraph IV.R. of Complainants' Complaint.
27. Respondents deny that the allegations in Paragraph IV.S. are contained in Complainants' Exhibit F. To the extent Complainants' allegations apply to Complainants' Exhibit E, Respondents believe that the transcript speaks for itself and otherwise deny Complainants' spin and mischaracterization of the statements made in said Exhibit and in Paragraph IV.S. of Complainants' Complaint.
28. Respondents admit that the Wharves approved an increase of the Access Fees to become effective July 1, 2014 but otherwise deny the allegations contained in Paragraph IV.T. of Complainants' Complaint.
29. Respondents lack sufficient knowledge or information to form a belief about the truth of the allegations contained in Paragraph IV.U. of Complainants' Complaint.
30. Respondents lack sufficient knowledge or information to form a belief about the truth of the allegations regarding market impact studies and analysis contained in Paragraph IV.V. of Complainants' Complaint because the term "market impact study or analysis" is not defined. Respondents otherwise deny the remaining allegations contained in Paragraph IV.V. of Complainants' Complaint.
31. Respondents admit the allegations in Paragraph IV.W. of Complainants' Complaint.
32. Respondents deny the allegations in Paragraph IV.X. of Complainants' Complaint.

33. Respondents admit that Complainants' representatives made the statements contained in Paragraph IV.Y of Complainants' Complaint. Respondents deny the remaining allegations contained in Paragraph IV.Y of Complainants' Complaint.
34. Respondents deny the allegations in Paragraph IV.Z. of the Complainants' Complaint.
35. Answering Paragraph IV.AA. of Complainants' Complaint, Respondents assert that the Tariff provisions speak for themselves. Respondents deny the remaining allegations contained in Paragraph IV.AA. of Complainants' Complaint.
36. Respondents lack sufficient knowledge or information to form a belief about the truth of Paragraph IV.BB. of Complainants' Complaint.
37. Respondents deny the allegations in Paragraph IV.CC of Complainants' Complaint. Additionally, Respondents assert that Complainants are estopped from asserting the allegations contained therein since Complainants initially requested the allegedly disparate treatment described in said paragraph.
38. Answering Paragraph IV.DD. of Complainants' Complaint, Respondents admit that Complainants and Discount Parking paid Access Fees as Off-Port Parking Users. Respondents deny the remaining allegations contained in Paragraph IV.DD. of Complainants' Complaint.
39. Answering Paragraph IV.EE. of Complainants' Complaint, Respondents admit that the Tariff does not impose Access Fees upon pedestrians. Respondents deny the remaining allegations in said paragraph, and Complainants' mischaracterization of the facts set out therein.
40. Answering Paragraph IV.FF. of Complainants' Complaint, Respondents admit that the Tariff does not impose Access Fees upon pedestrians. Respondents deny the remaining

allegations and Complainants' mischaracterization of the facts in Paragraph IV.FF. of Complainants' Complaint.

41. Respondents deny the allegations contained in Paragraph IV.GG. of Complainants' Complaint.
42. Answering the "Violations of the Shipping Act of 1984" in Section V. of Complainants' Complaint, Respondents deny each and every alleged violation of the Shipping Act set out in Paragraphs A., B., C., D., E., F. and G. therein.
43. Respondents deny the allegations set out in Paragraph VI.A. of Complainants' Complaint.
44. Respondents deny that Complainants are entitled to the relief set out in Section VII ("Prayer") of their complaint.
45. Respondents agree with Complainants' request that the Hearing on this matter take place in Galveston, Texas, as requested in Section VIII of Plaintiffs' complaint.

II. DEFENSES & AFFIRMATIVE DEFENSES

Respondents hereby assert the following affirmative defenses:

1. Lack of Subject Matter Jurisdiction. Respondents allege that the FMC lacks subject matter jurisdiction over the Complaint as it pertains to Respondent GPFC because GPFC is not a marine terminal operator as defined by 46 U.S.C.A. § 40102(14). Rather, it is a mere agent of a marine terminal operator. The Shipping Act does not authorize the FMC to regulate agents. *Landstar Express America, Inc*, 569 F. 3rd 493 (D.C. Cir. 2009). Additionally, Respondents allege that the FMC lacks subject matter jurisdiction over the Complaint as it pertains to Respondent Wharves because

the claims made the basis of this complaint are not sufficiently related to marine terminal operations so as to create jurisdiction under the Shipping Act.

2. Failure to State a Claim. Respondents allege Complainants' failure to state a plausible claim for relief. Complainants have alleged no facts sufficient to support a reasonable inference that the Complainants are entitled to any relief the FMC can grant.
3. Improper reliance on 46 U.S.C.A. § 41102(c). Complainants claim that Respondents violated Section 41102(c) by reason of "unjust, unreasonable and unlawful practices" is unfounded. This section applies only to regulations and practices "related to or connected with receiving, handling, storing, or delivering *property*." 46 U.S.C.A. § 41102(c), emphasis added. The Access Fees made the basis of Complainants' action are assessed against Off-Port Parking Users who wish "to pick up or drop off *passengers* within a terminal complex." (Page 3-J, Exhibit C to Complainants' Complaint, emphasis added).
4. Sovereign Immunity. Respondents are immune from suit, because Wharves and GPFC are governmental entities whose activities are governmental functions. *Lake Charles Harbor & Terminal Dist. v. Board of Trustees of the Galveston Wharves*, 62 S.W.3d 237, 246 (Tex. App. - Houston [14th Dist.] 2001, pet. denied) ("The [Galveston] Wharves is a governmental unit and as such is protected by the doctrine of sovereign immunity."). GPFC is a "local government corporation," established pursuant to Tex. Transp. Code Ann. §431.101 *et seq.* As such, it is a governmental unit whose operations are governmental, not proprietary, functions. *Id.* at §431.108; *see also* Op. Tex. Att'y Gen No. JC-0335 (2001). Thus, Wharves and GPFC are both

immune from suit. *MBP Corp. v. Board of Trustees of the Galveston Wharves*, 297 S.W.2d 483 (Tex. App. – Houston [14th Dist.] 2009, no pet.).

5. Estoppel. Complainants are legally and/or equitably estopped from asserting claims based on allegations of disparate treatment from other entities paying access fees calculated on a “per-trip” basis, because Complainants specifically requested that Wharves change the Tariff to provide for the current methodology. Had they not requested it, the current methodology would likely not have been put into place.

III. ADDRESSES

1. The name, address, and email address of Respondent The Board of Trustees of the Galveston Wharves is 123 Rosenberg, Shearn Moody Plaza- 8th Floor, Galveston, Texas 77550,
2. The name, address, and email address of Respondent Galveston Port Facilities Corporation is 123 Rosenberg, Shearn Moody Plaza- 8th Floor, Galveston, Texas 77550,
3. The names, addresses, and email addresses of Respondents’ attorneys are Anthony P. Brown and Wm. Hulse Wagner, McLeod, Alexander, Powel, & Apffel, P.C., 802 Rosenberg, Galveston, Texas 775501, mailing address P.O. Box 629, Galveston, Texas 77553, and email address apbrown@mapalaw.com and whwagner@mapalaw.com.

IV. NEED FOR HEARING

1. Respondents agree that a hearing is appropriate in this matter, and join in the request that the Hearing take place in Galveston, Texas.

V. PRAYER

WHEREFORE, PREMISES CONSIDERED, Respondent prays that the Complainant in this proceeding be resolved as follows:

1. The Complainants take nothing of their Complaint on file herein;
2. That the Commission award Respondents reasonable attorney's fees incurred in the defense of Complainants' action against these answering Respondents;
3. For costs and disbursements incurred herein;
4. For such other and further relief as the Commission may deem just and proper.
5. For the Complaint to be dismissed as to both Respondents.

Dated: July 21, 2014

Respectfully submitted,

McLeod, Alexander, Powel & Apffel, P.C.

By: 

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ATTORNEYS FOR THE BOARD OF TRUSTEES
OF THE GALVESTON WHARVES AND
GALVESTON PORT FACILITIES CORPORATION

VERIFICATION OF ANSWER

STATE OF TEXAS §
 §
COUNTY OF GALVESTON §

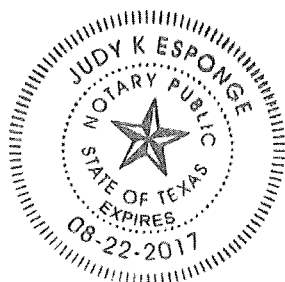
BEFORE ME, the undersigned notary on this day, personally appeared Michael Mierzwa, who known to me and being duly sworn, declared as follows:

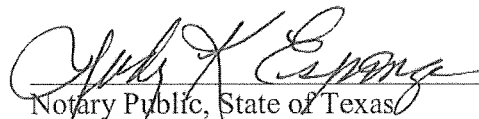
1. "I am over eighteen (18) years of age and fully competent and able to make this Verification.
2. I am employed as the Port Director for the Board of Trustees of The Galveston Wharves, a Respondent in this matter. Additionally, I am the President of The Galveston Port Facilities Corporation, a Respondent in this matter.
3. I have read the foregoing Answer and the facts stated therein, and believe them to be true and correct."



Michael Mierzwa

SUBSCRIBED AND SWORN TO BEFORE ME the undersigned Notary on this ____ day of July, 2014, by Michael Mierzwa, to certify which witness my hand and official seal.



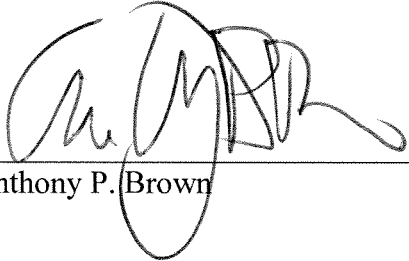


Notary Public, State of Texas

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of July, 2014, a copy of the foregoing document was served by certified United States mail, return receipt requested on Complainants' counsel of record.

Douglas T. Gilman
Gilman & Allison, LLP
2005 Cullen Blvd.
Pearland, Texas 77581



Anthony P. Brown